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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1231

MANUEL O. DELACRUZ,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Manuel O. DeLaCruz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 24, 1969.

The Opinion of the Court of Appeals for the Fifth Circuit is not yet reported, it is reproduced as Appendix A, *infra,* p. 1a. The Opinion on Rehearing is reproduced as Appendix B, *infra,* p. 1b.

JURISDICTION

The decision of the Circuit Court of Appeals was rendered on December 11, 1968, and Opinion on Rehearing rendered on January 15, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1.

Does the F.E.L.A. (45 U.S.C. §53) permit a district court to diminish a railroad employee's recovery for injuries resulting from the carrier's negligence, where:

(a) The plaintiff-employee's conduct was pursuant to the express direction of his supervisor, who assured employee that it was safe? or where:

(b) The plaintiff employee's conduct did not contribute to the accident?

2.

In an F.E.L.A. case, where the jury is instructed to diminish the award in proportion to the amount of employee's negligence, awards $12,000.00, and separately states in answer to a special issue that the amount of negligence attributable to employee is 50%, may the trial court diminish the award to $6,000.00?

STATUTE INVOLVED

45 U.S.C. §53; that portion of the F.E.L.A. entitled "Contributory Negligence; diminution of damages;" is printed in Appendix C, p. 1c, *infra*.

STATEMENT OF THE CASE

This is an F.E.L.A. case wherein Petitioner DeLaCruz (herein "employee") seeks damages from

the Santa Fe Railroad (herein "employer") for injury sustained while employee was working in a "drop pit" under a disabled locomotive which he was repairing.

The accident occurred as a result of the disabled locomotive, under which employee was working, being struck by a section of cars which was being moved on the repair track.

Employer's negligence was found by the jury, and is not disputed.[1] The issue here is whether there is basis for reducing employee's recovery.

The reduction resulted from a jury finding of 50% contributory negligence.

The undisputed evidence is that employee (who had never before worked in this pit) noted that the pit was deeper than he was tall, and that accordingly it would be impossible for him to see any movement on the repair track.

Accordingly, both employee, and his fellow employee, upon being directed by their foreman to work in the pit, inquired of the foreman as to whether working in the pit would be safe and were told by their foreman:

"You don't have to worry about anything. We

[1] The findings that employer was not negligent in failing to warn plaintiff; and in failing to provide a safe place to work, are wholly without support in the evidence. However, the finding that employer was negligent in striking the locomotive is sufficient to establish employer's primary negligence.

> have blue flag derails that have been installed. Mr. Austin, the rip track foreman, has been notified about it, to leave them [the derails] on, and the yardmaster [who has overall supervision of the yard] has been notified. You fellows are safe. Everything has been taken care of." (Tr. 46-47).

This testimony is corroborated by fellow employee (Tr. 525-533) and was not denied by the foreman.[2]

Actually, the protective derails were, at the time, in place.[3] Later in the day, unbeknownst to employee,[4] they were removed. The removal was flatly contrary to the published work rules, upon which all employees were entitled to rely. The rule was specific:

> ". . . Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employee, who will then remove the blue signals." (Tr. 216.[5])

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[2] The foreman was not called as a witness. Employer's failure to call him gives rise to the presumption that the foreman would acknowledge that he gave the directions and assurances as stated by the employees. *Mallory & Co. v. NRLB*, 400 F. 2d 956 at 959 (C.A. 7, 1968).

[3] Blue flag derails on repair tracks were authorized as a substitute for mounting a blue flag on the disabled engine. (Tr.216) See Appendix D.

[4] The assertion (First Opinion of the Court of Appeals at p. 5, lines 13-15) that employee knew that the derails were removed at 4:30 has no record support (Tr. 201-202).

[5] The Court of Appeals ignored this portion of the quoted rule. While quoting other portions of the Rule (Original Opinion, pp.4-5, App. A, *infra*, pp. 4a, 5a) the pertinent rule which we quote in the text was noted only by elipses.

The portion of the Rule quoted in the Opinion appears to require a blue signal on the disabled engine. But had the court below disclosed the entire rule, including that part indicated in the Opinion only by elipses, it would have seen that the Rule was satisfied by the installation of the blue flag derails which the foreman advised had been installed. We set out the entire rule at Appendix D, p. 1d, *infra*.

The removal of the derail opened the repair track for rail traffic. Not aware that the track was open, plaintiff continued to work in the pit as directed. A string of cars was pushed on to this track. The switchman saw the disabled locomotive at a distance of 8 to 10 car lengths, and gave two "easy" signals, and then "stop" and "washout" signals which were ignored by the switch engine operator doubtless because "it was quite apparent that somebody is asleep at the wheel" [of the locomotive which was pushing the string of cars], (Tr. 647.)

The switchman directing the movement of the cars acknowledged that he saw the disabled locomotive in plenty of time to stop.[7] He gave a series of "easy," then "stop," then "washout" or "emergency stop" signals, all of which were ignored. The operator of the switch engine continued to push the string of cars—they crashed into the disabled locomotive, under which plaintiff was working. Employee's injury resulted.

Reasons for Granting the Writ

1.

(a)

Employee's federal rights under FELA are measured one way in the Third Circuit—another in the Fifth.

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[6] See footnote 3, *supra.*

[7] He also acknowledged that the switching crew had earlier been advised of the fact that the disabled locomotive was undergoing repairs on this track. (Tr.540).

The Third Circuit holds it to be "fundamental and prejudicial error for the District Court to charge the jury on the issue of contributory negligence and its diminishing effect upon any verdict it might find," where a plaintiff in an FELA case was assigned by his supervisor certain work to do and was assured that it was safe to do so. The Third Circuit was specific that "He (plaintiff-employee) was justified, in relying on the experience of his superior . . . who was in complete control of the work crew." *Paluch v. Erie, etc. Ry. Co.*, 387 F. 2d 996 at 999 (C.A. 3, 1968); Appendix E, *infra.*, p. 1e.

The Fifth Circuit on the other hand, holds in the instant case that plaintiff-employee was not justified in relying on the experience of his superior, in control of the work, who ordered[8] him to work in the pit, and answered employee's query as to safety:

> "You don't have to worry about anything. We have blue flag derails that have been installed. Mr. Austin, the rip track foreman, has been notified about it, to leave them [the derails] on, and the yardmaster [who has overall supervision of the yard] has been notified. You fellows are safe. Everything has been taken care of." (Tr. 46-47).

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[8] The Fifth Circuit's suggestion of distinction between *Paluch*, where employee was "ordered" to climb the pole; and the case at bar on the ground that "plaintiff was not ordered to work under the locomotive without a blue signal light; *he was merely told that he could*" (Opinion on Rehearing, p. 3) has no record basis. Plaintiff here, as there, did as he was told.

The only basic difference between *Paluch* and the instant case is that in the former the employee was told to climb *up* a pole, while in the latter he was told to climb *down* into a hole.

Moreover, the Fifth Circuit holds (First Opinion, p. 5, footnote 5) and reaffirms on rehearing (Opinion on Rehearing, p. 2) that "the foreman was merely another employee whose affirmation [that it was safe to work in the hole] could be accepted, but did not necessarily free him from negligence as a matter of law."

Thus, a workman in the Fifth Circuit may "accept" his foreman's "affirmation"—but does so at his peril—for accepting such affirmation "did not necessarily free him from negligence. . . ."

But a workman in the Third Circuit is "justified in relying on the experience of his superior. . . ."—and when he does so it is "fundamental and prejudicial error" to charge him with negligence.

Surely, it is important to uniform and fair application of the FELA, and to the thousands of railroad workmen whose rights are governed by this federal statute to resolve the conflict. Workers in the railroad industry are entitled to know whether they may rely upon the directions and assurances made by their bosses.

(b)

They are similarly entitled to know whether they "should . . . anticipate a mistake," (as required by the Circuit Court's Opinion on Rehearing, at p. 3), or whether like all other workmen "in the absence of knowledge, actual or imputed, of another's neg-

ligence, one is not bound to anticipate and guard against its consequences; the duty to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence is apparent. . . " 65A C.J.S., "Negligence," §119, p. 49, and cases there cited.

The Court of Appeals imposes upon the workman in this FELA case a standard of care with respect to contributory negligence greater than is imposed upon the employer in defining primary negligence. Thus, according to the Fifth Circuit: ". . . plaintiff should have anticipated a mistake. . ." (Opinion on Rehearing, p. 3).

This requires railroad employees to exercise a higher degree of care than is required of employees not covered by FELA. The general rule is that "in the absence of knowledge, actual or imputed, of another's negligence, one is not bound to anticipate and guard against its consequences . . ." 65A C.J.S., "Negligence," §119, p. 49.

We had thought that FELA was intended to modify and liberalize common law barriers against recovery by railroad employees for industrial accidents. The Fifth Circuit in the instant case imposes under FELA more restrictive rules than did the common law.

2.

This is further apparent from the fact that plain-

tiff's recovery was diminished for his alleged contributory negligence which could not have contributed to the accident.

The alleged contributory negligence which diminished plaintiff's recovery was threefold: failing to keep a proper lookout for his own safety [*a physical impossibility for he was working, as instructed, in a hole so deep that he could not look out*]; failing to place a blue light on the disabled engine [*not negligence, for the rule required either such light on the engine, or a blue flag derail which the foreman assured him had been installed;*[9] and in placing himself in hazardous position under the engine [*as we have shown, pursuant to his supervisor's instruction, and in reliance upon his foreman's assurance of safety*]. Thus, there was no contributory negligence.

But assuming, *arguendo,* that there was, it did

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[9] The Circuit Court noted (Opinion on Rehearing, Slip Opinion, p. 3) that the applicable rule with respect to protective signals provided alternatives, either (1) a blue signal on the disabled locomotive, or (2) a blue derail elsewhere on the track.

The court seeks to distinguish *Paluch,* as follows:

> "In Paluch the employee was ordered by his foreman to climb a pole. The employee had no reason to know that the pole was unsafe, which, in fact, it was. In the case at bar plaintiff was not ordered to work under the locomotive without a blue signal light; he was merely told that he could. He knew that the rule imposed a personal duty upon him to place a blue signal on the locomotive, although *it offered alternative of a blue derail elsewhere on the track.* It must be obvious, however, particularly when plaintiff was going to be there a number of hours, that marking the engine was safer than a derail down the track, admittedly out of sight, and subject to later removal without plaintiff's knowledge."
> (Emphasis added).

Although the rule required only one or the other alternative, the Fifth Circuit requires of plaintiff, both. And holds him contibutorily negligent for failure to do that which neither the rule nor his foreman required.

not—it could not have—caused the accident. The rule is clear. Restatement, Torts 2d. Vol. 2, p. 510, Sec. 465:

> "The plaintiff's negligence is a legally contributory cause of his harm if, but only if, it is a substantial factor in bringing about his harm. . ."

The accident was caused, as the undisputed evidence shows, solely by the failure of the operator of the switch engine to heed the switchman's series of signals to stop.

The switchman, riding the front boxcar which collided with the disabled locomotive saw the locomotive in plenty of time to stop.[10] He gave an "easy" signal which was relayed through foreman Wilson to the operator of the switch engine.[11] The signal was ignored. A second "easy" signal was given, and ignored. A "stop" signal was given and likewise ignored. A fourth "washout" or "emergency stop" signal was given. The switch engine did not respond to any of these signals, but crashed into the locomotive under which plaintiff was working.

The first signal was given when ten car lengths away from the disabled engine (Tr. 650), which

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[10] He was *ten car lengths* from the disabled engine when the first signal was given (Tr. 650).

[11] The switch engine was being operated by the fireman—the engineer was sitting in fireman's seat.

was bathed in light. The switchman who gave the signals to stop testified (Tr. 659-660):

> "Q. I will ask you this: In view of the circumstances that led up to the collision as you described them to us, had there been a blue light on that engine, would it have made any difference in the ability to have avoided the collision?
>
> A. No, sir, because I could not have seen that blue light before I saw that white light under that engine, it being a duller light."

Thus, even if there had been a red, white and blue light on the disabled engine or had it been bathed in brilliant blue, it would have made no difference. For the function of the blue light would have been to alert the brakeman to the presence of the disabled engine in time to signal the operator of the switch engine. He acknowledged that he was timely alerted.[12] The cause of the accident was thus not a failure to be alert to the presence of the engine—but rather, failure of the fireman operating the engine to respond to a series of signals from the brakeman.

Thus, the courts below have diminished a workman's FELA award based upon his alleged derelictions which were no factor in bringing about his harm.

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[12] The Court's assertion (Opinion, p. 3, note 2) that "had the signals been given sooner, i.e. before a certain ground man was passed, it is likely that they would have been more forcefully brought to the engineer's attention," has no basis in the record. There is not a scintilla of evidence as to when the operator of the switch engine stopped watching his switchman. It is pure speculation that he would have been watching an earlier signal.

Again, at common law a workman is responsible only for such contributory negligence as is "a substantial factor in bringing about his harm."

FELA was enacted to remove common law barriers to the worker's recovery for industrial accidents. Surely, in applying FELA the courts err when they assume, contrary to the evidence, a causal relationship between negligence and injury, which at common law must be shown by evidence to be "a substantial factor in bringing about his harm."

3.

A final error of importance in the application of FELA appears in the trial court's instructing the jury to diminish the damages, and then diminishing that which the jury had already diminished.

The jury was instructed that if they found contributory negligence they were to reduce the recovery "to the extent that you find from a preponderance of the evidence the negligence of [plaintiff] contributed to the injuries . . ."[13] The jury assessed damages of $12,000.00.

The jury found, further, that plaintiff's negli-

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[13] The entire instruction is:

"You are further instructed that if it is shown by a preponderance of the evidence that DeLaCruz was negligent and that his negligence in whole or in part caused his injuries, if any, the amount of damages, if any, you find in answer to Special Issue No. 6 will be reduced to the extent that you find from a preponderance of the evidence the negligence of DeLaCruz contributed to the injuries, if any, of DeLaCruz."

gence contributed 50%. The judgment was for only $6,000.00.

Thus, in addition to following the statutory direction that "the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee," (45 U.S.C. §53, emphasis added) the courts below have permitted the jury to diminish the damage by that amount—and they have again diminished by a like percentage.

The statute says the diminution shall be "by the jury." It does not authorize the court to again diminish that which the jury has already cut in half.

CONCLUSION

Important questions in the application of a federal statute which applies to thousands of railroad workers are posed by this case. At least one of these is answered one way in Philadelphia—another in New Orleans. The courts below have imposed rules more strict than those applicable at common law against employees who by the FELA are entitled to a liberalization of the roadblocks to recovery erected by the common law. Accordingly, certiorari should be granted, and upon review the judgment should be reversed, and alternatively, either judg-

ment for $24,000.00[14] should be entered for plaintiff, or the case remanded for new trial.

Respectfully submitted,

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[14] Since the jury presumably reduced the damages by 50% because of an an inadmissible finding of contributory negligence in their $12,000.00 finding.

APPENDICES

APPENDIX A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26062

MANUEL O. DeLaCRUZ,

Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

(December 11, 1968)

Before ALDRICH*, GODBOLD and DYER, Circuit Judges.

ALDRICH, Circuit Judge: This is an FELA action brought against the Atchison, Topeka and Santa Fe Railway Company by Manuel O. DeLa Cruz for injuries sustained while working under a locomotive in a pit as a result of the locomotive's being struck by a section of cars that was being moved on a repair track. The trial resulted in a verdict for the plaintiff, reduced, however, by a

*Of the First Circuit, sitting by designation.

special finding of 50% contributory negligence. On plaintiff's appeal the principal objections relate to rulings with respect to the adequacy of the evidence in certain particulars and to some of the special interrogatories.

The basic facts were these. The accident occurred at about 9:30 p.m. The plaintiff, a machinist in the employ of the defendant for 16 years, had arrived at the scene during the afternoon. A company rule required that equipment being worked on be marked at both ends with a blue flag by day and a blue light by night. In this instance no blue signal was shown, and although the locomotive was under a flood light, this did not disclose the presence of the plaintiff. On the track leading to the pit, number 1, and on several parallel repair tracks, cars were being worked on by carmen and moved about during the afternoon. Most of this operation was discontinued at 4:30. At 9:30 a section was being pushed at a slow rate of speed on track 1 in the direction of plaintiff's locomotive. The trainman on the boxcar at the front, seeing the locomotive, gave cautionary signals to the engineer and, eventually, a stop signal, but all were disregarded and the locomotive was struck. There is no dispute as to finding of defendant's negligence;[1] all questions on this appeal relate to plaintiff's.

We consider first plaintiff's claim that any negli-

[1] The jury, in answer to special questions, found defendant not negligent in failing to warn plaintiff of the moving cars, or of failing to provide a safe place to work, but did find negligence in the striking of the locomotive.

gence on his part with regard to failure to mark the locomotive could not, as a matter of law, have contributed to the accident in the light of the fact that the trainman did give signals and the engineer ignored them. The record did not warrant such a ruling. The unintended and perhaps careless striking of other equipment is a matter of common occurrence in yard operations and may be attended by little or no consequences so far as property damage is concerned. There was adequate evidence from which the jury could have found that had it been realized that striking the locomotive in this case would involve danger to personnel more significant steps would have been taken.[2] Plaintiff would clearly have been entitled to an instruction, or to a jury special question, on this issue, but he asked for neither. He was not entitled to a directed finding in his favor.[3]

In connection with some of plaintiff's other contentions it is necessary to consider the record further. First we quote the safety rule, which con-

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[2] The trainman, at the front of the moving cars gave considerable self-contradictory testimony; but at one point he answered the following question in the affirmative. "[I]f there had been a blue light on the cars [*sic* — but the context and adjoining questions show clearly this meant "locomotive"] you would have started all of this much sooner, and in all likelihood, would have had it completed or you could have given some warning earlier. if the blue light that should have been on there, was on there. Is that correct? A. That is right, sir." On the record, had the signals been given sooner, *i.e.*, before a certain ground man was passed, it is likely that they would have been more forcefully brought to the engineer's attention. Plaintiff, quite properly, does not assert the "last clear chance" doctrine. *Atlantic Coast Line RR. Co.* v. *Anderson*, 5 Cir., 1959, 267 F.2d 329, *cert. denied*, 361 U.S. 841.

[3] Nor, of course, could plaintiff revive rights lost by failure to make timely objection, *Ford* v. *United Gas Corp.*, 5 Cir., 1958, 254 F.2d 817, *cert. denied* 358 U.S. 824, by the device of moving for a new trial. *Francis* v. *Southern Pac. Co.*, 1948, 333 U.S. 445; *Hobart* v. *O'Brien*, 1 Cir., 1957, 243 F.2d 735.

cededly was not complied with. The presently material portions read as follows.

> "Mechanical Department employees will comply with Operating Department Rule 26, which reads: 'A blue signal, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen. . . .

INSTRUCTION FOR LOCOMOTIVE, CAR AND OTHER MECHANICAL DEPARTMENT EMPLOYEES.

A. The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Except as provided in the last paragraph of operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or about an engine, car or train until it is

known that blue signals have been properly displayed. . . ."[4]

Plaintiff's first evidentiary contention is that he did not have to comply with the blue light rule because his foreman had told him that a protective blue-marked derail was on the track, and the track foreman had been informed of his presence. It is true that plaintiff so testified. However, his pretrial statement was inconsistent therewith. The jury was warranted in disbelieving his in-court testimony.[5]

Next, plaintiff said that a blue derail had been on the track during the afternoon, and he assumed it would remain. To this defendant replied that it was customary to remove derails at 4:30 when the carmen left, as plaintiff knew, and that plaintiff had seen the consequence of this even on the day in question. Plaintiff, in turn, admitted that after 4:30 he had seen cars being moved on the other tracks past where the derails had been, but said he saw none on No. 1. There was testimony, however, that cars had been so moved on track 1 at 5 o'clock.

Finally, plaintiff tells us, "there was no evidence

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[4] Plaintiff makes an elaborate argument that the jury could not reasonably find that this rule applied to him personally. The short answer is that we do not agree.

[5] It may also be said that if it was appropriate, as we believe it was, for the jury to find defendant negligent in not apprehending the possibility of a person being on the locomotive even though the blue signal was not shown, it could find plaintiff negligent in relying upon the word of another employee to relieve him of his duty to protect himself, particularly when this duty could have been easily and effectively complied with.

that the blue signals were available." This is simply not so.

At the conclusion of the evidence, to substitute for an enigmatic general verdict, *see Page v. St. Louis Southwestern Ry. Co.*, 5 Cir., 1965, 349 F.2d 820, 822, pellucidity, the district court submitted a number of special questions to the jury. At first blush we might agree with plaintiff that there were too many with respect to contributory negligence, and that some were, in effect though not in language, repetitious. However, on consideration we believe that any possible error was not only not prejudicial, but was due to the many forms of plaintiff's resistence to the defense of contributory negligence. We will discuss only the most questionable of these instructions.

> 3. "Do you find from a preponderance of the evidence that DeLaCruz was negligent in one or more or all of the following respects: . . . (f) In placing himself in a hazardous position under or about the engine in question. Answer 'yes' or 'no' ANSWER *Yes*"

While, standing alone, this question might look as if plaintiff were being charged with assumption of the risk — an interpretation that he did not claim, either in the district court or here — it will be seen by reference to the last-quoted paragragh from the blue signal rule, supra, that the form of this question was with specific reference thereto.

In sum, we find no error either with regard to the failure to direct a verdict of no contributory negligence, or with respect to the form of the special questions.

Plaintiff's other objections may be readily disposed of. There was no need for the court to put to the jury on the voir dire questions as to whether they would be impressed by certain types of damage testimony. It is to be assumed that jurors will follow at least all routine instructions as to how they should resolve issues. Such inquiry is not, as plaintiff contends, a legal concomitant of the right of peremtory challenge.

Rather, the district court, whose discretion is broad in this area, might well feel that this was but a subtle attempt on counsel's part to lay a foundation for his case.

Plaintiff's claim that the jury finding on damages itself reflected the 50% contributory negligence adjustment and that the court's subsequent reduction made a double reduction is contrary to the plain language of the instructions and the jury questions themselves.

Finally, although the plaintiff's gross recovery was perhaps incommensurate with plaintiff's damage testimony, whether or not there should be a new trial was a matter within the discretion of the district court. We find no abuse. Plaintiff's damage evidence was substantially disputed.

AFFIRMED.

APPENDIX B

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26062

MANUEL O. DeLaCRUZ,

Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

(January 15, 1969)

ON PETITION FOR REHEARING
Before ALDRICH*, GODBOLD and DYER, Circuit Judges.

ALDRICH, Circuit Judge: Plaintiff appellant's petition for rehearing, concluding that our opinion may be "accurately characterized" in the language of the court in *Page v. St. Louis SW. Ry.*, 5 Cir., 1965, 349 F.2d 820, 827, as "confusion and a proliferation of metaphysical terms scarcely understand-

*Of the First Circuit, sitting by designation.

able to the most astute scholar," essentially repeats the arguments made in his original brief, which is not the intended function of such a petition. However, one argument we possibly dealt with insufficiently, as plaintiff has replied with an unjustifiable, but perhaps superficially plausible contention.

According to plaintiff's testimony he was told by his foreman that the track was marked with a blue derail and that it would be safe for him to work under the locomotive even though it, itself did not bear a blue signal. In his original brief plaintiff first inquired how he could be negligent "when he relies upon the representation of his foreman that he is working under safe conditions . . .?" Later, immediately prior to the claim, which the record totally refutes, that "there was no evidence that the blue signals were available," plaintiff amplified this by stating, "Surely neither the railroad, or the law, or this Court, would expect the crewmen to challenge the work [sic] of their boss. If one did he would not long be a crewman or employee!" In response, we referred to the testimony that his "foreman had told him that a protective blue-marked derail was on the track," but stated that so far as protecting him from contributory negligence was concerned, the foreman was merely another employee whose affirmation could be accepted, but did not necessarily free him from negligence as a matter of law.

In his petition for rehearing plaintiff says he was not merely relying upon the foreman's word, but was following instructions, so that his case is on

"all fours" with the case of *Paluch v. Erie, L. RR.*, 3 Cir., 1968, 387 F.2d 996. It is not. In *Paluch* the employee was ordered by his foreman to climb a pole. The employee had no reason to know that the pole was unsafe, which, in fact, it was. In the case at bar plaintiff was not ordered to work under the locomotive without a blue signal light; he was merely told that he could. He knew that the rule imposed a personal duty upon him to place a blue signal on the locomotive, although it offered the alternate of a blue derail elsewhere on the track. It must be obvious, however, particularly when plaintiff was going to be there a number of hours, that marking the engine was safer than a derail down the track, admittedly out of sight, and subject to later removal without plaintiff's knowledge.

As we pointed out, the possibility of someone's error, even the plaintiff's warranted the jury in finding the railroad negligent in spite of the absence of a blue signal on the locomotive. By the same token, the jury could have found that the plaintiff should have anticipated a mistake, particularly when it would have been so easy to have protected himself. If plaintiff had been ordered by the foreman not to place a signal on the locomotive, that would have been another matter. The record required no such finding.

The jury concluded that both parties were equally negligent. We believe this was not only justifiable, but entirely reasonable. The petition for rehearing is denied.

APPENDIX C

45. U.S.C.A. §53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX D

INSTRUCTIONS for Locomotive, Car and Other Mechanical Department Employees.

The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Metal signs, painted blue, suspended from brackets or used in connection with derails on repair tracks, will be regarded as proper blue signals prescribed by Operating Department Rule 26.

Except as provided in the last paragraph of Operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or above an engine, car or train until it is known that blue signals have been properly displayed.

When more than one class of these workmen are employed under or about an engine, car or train one set of blue signals will be used and an understanding reached by employees involved as to who will display and remove the blue signals. Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employe, who will then promptly remove the blue signals.

The Company does not require its employes to incur risks and directs them to exercise proper care and judgment to protect themselves. (Portions of rule ignored by Circuit Court in italics)

APPENDIX E

PAUL P. PALUCH, Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY

No. 16463

United States Court of Appeals
Third Circuit

Argued Sept. 29, 1967.
Decided Jan. 3, 1968.

Rehearing Denied Feb. 6, 1968.
Before McLAUGHLIN, HASTIE and FORMAN, Circuit Judges.

OPINION OF THE COURT

FORMAN, Circuit Judge.

[1] Apellant, Paul P. Paluch, brought this action in the United States District Court for the District of New Jersey under the Federal Employers' Liability Act[1] against his employer, Erie Lackawanna Railroad Company (Railroad), to recover damages for injuries sustained in the course of his employment. The jury rendered a verdict for the appellant. Attacking the verdict, principally on the ground of

[1] 45 U.S.C #51 et. seq.

it's gross inadequacy, the appellant sought a new trial. From the order of the District Court denying the motion for a new trial, appellant brought this appeal.[2] Appellant raises two issues: first, he renews his contention that the verdict is grossly inadequate, and second, he argues that the verdict is contrary to law.

The essential factual background is that appellant, aged 52, at the time of his accident on February 13, 1964, was employed as a signalman. He was one of a crew of workmen under the direction of a foreman, William Brickman, who was to remove wires from telegraph poles along the Railroad's right of way on the Boonton Branch west of its station at Paterson.

Appellant was assigned to the task of cutting the wires attached to cross arms at the top of a pole 29 feet high. He had never performed such work and was unfamiliar with the condition of the pole. Appellant inquired from Mr. Brickman, who was long experienced, whether the pole was safe. He was assured that it was. Thereupon he mounted the pole stationed himself at one of the cross arms and cut each of the wires attached thereto pursuant to

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[2] Except in extraordinary circumstances, not present here, an order denying a motion for a new trial is not appealable. However, where as here, the appeal is timely taken in regard to the final judgment and the intent of the appellant to appeal from the final judgment is clear, it is the general rule to treat the appeal from the order denying the new trial as harmless error and to consider the appeal as if taken from the final judgment. Croming v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142, 144 (3 Cir. 1964); 6A Moore, Federal Practice, ¶ 59.15 [1] (2d ed. 1966). Accordingly, this appeal will be treated as if taken from the final judgment.

a signal given him by Mr. Brickman. The wires were simultaneously cut from another pole and when thus freed they were conducted by other workers to a truck equipped with a winch, which wound the removed wires on a reel. As appellant cut the last wire the pole toppled to the ground with appellant still clinging to its side.

The pole that fell was known as a "dead end" pole. Wires ran to it and then down to a relay case in the ground. The evidence indicated that the pole which appellant was required to climb was rotted and completely severed at ground level. A "stub" pole had been driven beside it and was lashed to it with wire in order to support it. Mr. Brickman testified that on the day before the accident he went to the job site to inspect the condition of the pole. He stated that he pushed the pole back and forth and also stuck his penknife into the stub pole at ground level. From his tests he concluded that the pole was safe to climb. After the accident it was learned that the stub pole too had rotted just below the ground level.

As a result of the fall appellant, was rendered unconscious for about seven hours. One of the step spikes on the pole penetrated his face fracturing his cheekbone; his right tibia was also fractured resulting in a permanent one-quarter inch shortening of the leg; he sustained a concussion with minute hemorrhages within the brain tissue. Appellant was confined in a hospital as a result of these

injuries for 28 days. He testified that among the effects of his injury his right wrist, which was sprained by the fall, swells when he attempts to climb a ladder; that he still suffers from dizziness when he bends too far forward or backward; and that he has difficulty concentrating because of a burning sensation in his head and ringing in his ears.

Seven months after the accident appellant returned to work. His loss of wages during that period totaled $3,636.80, and together with the medical expenses he personally incurred, it was shown that his out of pocket expenses amounted to at least $4,210.55. The verdict the jury returned was for $6,000.

The Federal Employers' Liability Act provides that contributory negligence shall not be a bar to recovery under the Act. If an employee is shown to have been contributorily negligent then the jury shall be instructed to diminish the damages recoverable in proportion to the employee's negligence.[3] The District Judge submitted the case to the jury with these instructions on the issue of damages.

[2-5] In maintaining that the verdict was con-

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[3] U.S.C. §53.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *."

trary to law, appellant asserts that the Railroad "made no reference to any act of contributory negligence on the part of the plaintiff, nor did it present any proof of it." In a case such as this, under the Federal Employers' Liability Act, the burden of proving contributory negligence is, of course, on the Railroad.[4] The entire record has been scrutinized to determine the validity of appellant's position that the Railroad failed to establish any contributory negligence. The evidence clearly indicated that appellant was totally inexperienced in the work he was instructed to undertake. He was justified in relying on the experience of his superior, Mr. Brickman, who was in complete control of the work crew. Mr. Brickman indicated to appellant that he had tested the pole and found it to be safe. As it turned out, the stub pole, as well as the main pole, was rotted below the surface level. If Mr. Brickman, a man of experience, did not discover the defect, there is no ground to assert that the appellant was contributorily negligent on the basis that he did not find the pole defective, a contention advanced by the Railroad. Certainly, it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one.[5] From the evidence presented at the trial of this case, a jury could not properly find a lack of due care by the appellant. It was, therefore, fundamental and prejudicial error for the District Court to charge the jury on the

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[4] Central Vermont Ry. v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed 1433 (1915); Mumma v. Reading Co., 247 F. Supp. 252 (E.D. Pa. 1965).

[5] Morran v. Pennsylvania R.R. Co., 321 F.2d 402, 403 (3 Cir. 1963).

issue of contributory negligence and its diminishing effect upon any verdict it might find in favor of appellant.[6]

Counsel for appellant, however, failed to seasonably object to the District Judge's charge on contributory negligence. It was not until the oral argument in support of the motion for a new trial that counsel for appellant argued that no proof had been offered by which appellant could be found contributorily negligent. In denying the motion for a new trial the District Judge declined to rule as a matter of law that there was no contributory negligence. Indeed, he took occasion then to allude to the probable finding by the jury of contributory negligence as the reason for the verdict of $6,000.

[6-8] Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.[7] has not been overlooked. It generally prevents a party from assigning as error on appeal an instruction to the jury when no objection to the instruction was made prior to the jury's retirement. A purpose of the rule is to assure the trial court an opportunity to make appropriate cor-

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[6] Smith v. Lauritzer, 356 F.2d 171 (3 Cir. 1966); Eichmann v. Dennis, 347 F.2d 978 (3 Cir. 1965); Moore v. Smith, 343 F.2d 206 (3 Cir. 1965); Morran v. Pennsylvania R.R. Co., 321 F.2d 402 (3 Cir. 1963); O'Neill v. Reading Co., 306 F.2d 204 (3 Cir. 1962).

[7] Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

rection of its rulings and instructions.[8] The lapse of appellant's counsel in failing to comply with the rule is not to be encouraged.[9] Nevertheless, this court has declined to permit such a technicality to cause a miscarriage of justice.[9] In Freifield v. Hennessy, 353 F.2d 97, 99 (3 Cir. 1965), the court stated:

> "Where it is apparent on the face of the record that counsel failed to object to a fundamental and highly prejudicial error, and this failure may have resulted in a miscarriage of justice, the error must be noticed and rectified."

Thus, in rare instances, where fundamental error occasions a miscarriage of justice, this court will notice such error despite counsel's failure to comply with rule 51.[10] The charge to the jury in this case on an issue on which no evidence had been offered was such fundamental error. Allowing the jury to speculate on contributory negligence and thereby possibly to diminish the compensation recoverable, under the circumstances of this case, was a miscarriage of justice.

This fundamental error compels a new trial. It is

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[8] 5 Moore, Federal Practice ¶ 51.04 (2d ed. 1966).

[9] In Atkinson v. Roth, 297 F.2d 570, 575 (3 Cir. 1962), the court in commenting on counsel's failure to enter a proper objection, stated:
"We are not unconcerned with the failure of counsel to perceive and bring to the attention of the court, on the record, such matter. But, the function of the trial judge necessarily extends beyond conclusive reliance upon counsel. It is the administration of justice with which we are dealing, and this includes the prevention of a miscarriage of justice."

[10] Ratay v. Lincoln Natl Life Ins. Co., 378 F.2d 209 (3 Cir. 1967); cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967); Freifield v. Hennessy, 353 F.2d 97 (3 Cir. 1965); Mazer v. Lipschutz, 327 F.2d 42 (3 Cir. 1963); McNello v. John B. Kelly, Inc., 283 F.2d 96 (3 Cir. 1960).

therefore unnecessary for the court to consider appellant's contention as to the gross inadequacy of the verdict.

[9] Appellant seeks a new trial restricted to the issues of damages, or, in the alternative, a new trial on all issues. The jury, in finding a verdict for the plaintiff, necessarily concluded that the defendant was negligent. Since the issue of damages in this case is distinct and separable from the issue of liability, and since the interests of justice will be best served by doing so, a new trial will be ordered restricted to the issue of damages."

The judgment of the District Court will be reversed and a new trial will be ordered limited to the issue of damages.

GERALD McLAUGHLIN, Circuit Judge (dissenting, on grounds immaterial to this Petition).

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[1] Rule 59(a) Fed.R.Civ.Proc., 28 U.S.C.: Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142 (3 Cir. 1964); Darbrow v. McDade, 255 F.2d 610 (3 Cir 1958).